

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In re:

THE FINANCIAL OVERSIGHT AND
MANAGEMENT BOARD FOR PUERTO
RICO,

as representative of

THE COMMONWEALTH OF PUERTO
RICO, *et al.*

Debtors.¹

PROMESA Title III

No. 17 BK 3283-LTS

(Jointly Administered)

**RESPONSE OF THE UNITED STATES OF AMERICA TO ORDER REGARDING
PLAN MODIFICATION NECESSARY TO THE ENTRY OF AN ORDER
CONFIRMING PLAN OF ADJUSTMENT FOR THE COMMONWEALTH OF PUERTO
RICO, THE EMPLOYEES RETIREMENT SYSTEM OF THE GOVERNMENT OF THE
COMMONWEALTH OF PUERTO RICO,
AND THE PUERTO RICO PUBLIC BUILDINGS AUTHORITY**

The United States has received and reviewed the Court's January 10, 2022 *Order Regarding Plan Modification Necessary for the Entry of an Order Confirming Plan of Adjustment for the Commonwealth of Puerto Rico, the Employees Retirement System of the Government of the Commonwealth of Puerto Rico, and the Puerto Rico Public Buildings Authority* (Docket No. 19721) ("Order") and offers the following in response.

¹ The Debtors in these Title III Cases, along with each Debtor's respective Title III case number and the last four (4) digits of each Debtor's federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation ("COFINA") (Bankruptcy Case No. 17 BK 3284) (Last Four Digits Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority ("HTA") (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico ("ERS") (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations); and (v) Puerto Rico Electric Power Authority ("PREPA") (Bankruptcy Case No. 17 BK 4780-LTS) (Last Four Digits of Federal Tax ID: 3747). (Title III case numbers are listed as Bankruptcy Case numbers due to software limitations).

1. On January 7, 2022, the United States filed its *Notice of Participation by the United States of America* (Docket No. 19710) notifying the Court that the United States intends to “participate in the above-captioned proceeding for the purpose of defending the constitutionality of PROMESA as it applies to the proposed approval of the Plan of Adjustment.” Docket No. 19710 at 2.

2. On January 10, 2022, the Court issued its Order stating that the Court was prepared to enter findings of fact and conclusions of law, concurrently with a confirmation order, promptly upon the Debtors’ filing of a Sixth Modified Eighth Amended Plan that conforms with specified paragraphs in the Court’s proposed findings of fact and conclusions of law (“FFCL”) and proposed confirmation order attached as Attachments 1 and 2, respectively, to the Order.²

3. The Order required the Oversight Board to file a compliant Sixth Modified Eight Amended Plan by January 14, 2022, at 11:59 p.m. (AST).

4. The United States files this response to assist the Court in determining whether to confirm the Sixth Modified Eighth Amended Plan, assuming the Oversight Board does indeed file such a plan by the deadline that, in the Court’s view, complies with the Order. If the Oversight Board does not do so, the United States reserves its right to respond further to defend the constitutionality of PROMESA as it applies to the current or any subsequent plan that the Oversight Board does file.

5. Except as qualified hereafter, the United States agrees with the Court’s proposed legal conclusions with respect to those objections raising constitutional challenges to PROMESA and the Plan. For the reasons set forth in the FFCL, the Court has either appropriately proposed to (a) overrule those objections or (b) require modifications in the Sixth Modified Eighth Amended Plan

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Order.

such that holders of Allowed Eminent Domain and Inverse Condemnation Claims receive 100 percent of their claims, thereby avoiding any potential constitutional conflict.

6. With respect to the claims of the Credit Unions and Suiza Dairy, the United States acknowledges the Court's merits determinations that neither holds a claim that the Fifth Amendment protects. *FFCL* at ¶ 161 n.35 (Credit Unions) and ¶ 174 (Suiza Dairy). The United States takes no position regarding those determinations but reiterates that, as the Court intends to find with respect to the Eminent Domain and Inverse Condemnation Claims, claims that are subject to the protections of the Just Compensation Clause of the Fifth Amendment cannot be subject to impairment and discharge in bankruptcy without raising substantial constitutional concerns. *See In re City of Detroit*, 524 B.R. 147, 304-07 (Bankr. E.D. Mich. 2014).

7. Finally, the Court has proposed finding that the Plan does not provide for non-consensual third-party releases. *Id.* at ¶ 237. The United States takes no position on the merits of this finding, especially since the United States lacks knowledge about the nature of the consent provided and as the Court states, claims of the United States are carved out from Released Claims, *id.*; however, in the United States' view, non-consensual third-party releases in bankruptcy cases, except as otherwise provided in 11 U.S.C. § 524(g), are unlawful and pose a potential constitutional issue.

This 14th day of January 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January 2022, I caused a true and correct copy of the foregoing *Response* to be filed with the Clerk of the Court using the CM/ECF system, which will generate electronic notification to all CM/ECF participants in these cases.

/s/ Matthew J. Troy
Matthew J. Troy